Supreme Court, U.S.
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No. 94132

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CAROLEE STEPHENSON, AND BETTYLU STEPHENSON, Also Known as BETTYLU ZEH,

Petitioners,

V.

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether the petitioner Carolee Stephenson's due process or equal protection rights, guaranteed by the Fourteenth Amendment to the Constitution of the United States, were violated as the result of the State of Oklahoma not requiring personal service of summons as required by its own Statute.

2. Whether the petitioner Bettylu Zeh's due process rights, guaranteed by the Fourteenth Amendment to the Constitution of the United States, were violated as the result of the State of Oklahoma not requiring her, as an owner of the property sought to be condemned, to receive an opportunity to negotiate for the amount of condemnation damages.

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The Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma whereby it denied discretionary review on April 19, 1994.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of the State of Oklahoma, Division III, is reported at Vol. 65 Oklahoma Bar Journal 1655-1656.

JURISDICTION

The judgment of the Court of Appeals of the State of Oklahoma, Division III, was entered on March 8, 1994. A timely Petition for Certiorari to the Supreme Court of the State of Oklahoma was filed on March 22, 1994; it denied discretionary review on April 19, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257, the petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Section One of the Fourteeth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. This case also involves the following provisions of the Statutes of Oklahoma:

66 Oklahoma Statutes Section 53(B)(1991)

> "The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of state or a resident of this state who has departed herefrom

with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor, or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued."

27 Oklahoma Statutes Section 13 (1) (2) (3) (1991)

"1. Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.

2. Real property shall be appraised before the initiation of negotiations,

and the owner or his designated representative shall be given an opppor-tunity to accompany the appraiser during his inspection of the property, except that the head or governing body of the entity acquiring real property, if so mandated by federal law or regulation, may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value as such value is defined by federal law or regulation.

3. Before the initiation of negotiations for real property, an amount shall be established which is reasonably believed to be just compensation therefor and such amount shall be promptly offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such real property."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Oklahoma, whereby said Court denied discretionary review on April 19, 1994, of the decision of the Court of Appeals of the State of Oklahoma, Division III, determining that the petitioner Carolee Stephenson was not required to be personally served with summons even though State law required such notice, and determining that the petitioner Bettylu Zeh did not have the right as a property owner to be negotiated with prior to filing a condemnation action against her. As the result of the respondent Western Farmers Electric Cooperative's unlawful actions the respondent destroyed the entire farm shelter belt of the petitioners consisting of two hundred and seventy-five, forty year old trees, and erected a high voltage electric transmission line consisting of electric conductors carried by wooden H-frame structures.

The record in this case is composed of an original record (hereinafter referred to as "O.R.") of 32 pages; a separately paginated, one volume, 8 page personal service hearing transcript (dated May 27, 1992, and hereinafter referred to as "T1"); a separately paginated one volume 21 page, personal service hearing transcript (dated June 2,

1992, and hereinafter referred to as "T2"); a separately paginated, one volume, 45 page, personal service hearing transcript (dated October 23, 1992, and hereinafter referred to as "T3"), and a separately paginated one volume, 54 page, property owner hearing transcript (dated February 4, 1993, and hereinafter referred to as "T4"). Additional proceedings include that of the Supreme Court of Oklahoma, in Case Number 79754 (proceedings commenced June 4, 1992, and hereinafter referred to as "O.S.C1"); and that of the Supreme Court of Oklahoma, in Case Number 81206 (proceedings commenced on March 3, 1993, and hereinafter referred to as "O.S. C2.")

After never negotiating with Bettylu Zeh (hereinafter referred to as "Bettylu") and after never delivering to her any correspondence indicating such an attempt to negotiate, Western Farmers Electric Cooperative (herinafter referred to as "Western Farmers") filed a petition for the taking of land by right of eminent domain against Carolee Stephenson (hereinafter referred to as "Carolee") and Bettylu on April 30, 1992, (O.R. 1-3, T4. 4, 32-34, 36-39). Service of the Notice in Condemnation scheduling a hearing date of May 27, 1992, was obtained on Bettylu on May 3, 1992, (O.R. 7-9). On

May 11, 1992, John Shadid called Carolee's home telephone number to say that he had some legal papers for her, and that she should later go to her door to get them (T3. 4). Later, someone did come to her home, say something, and leave some papers outside her door. On or after June 2, 1992, being six days after the date on which the hearing was attempted to be held pursuant to the Notice in Condemnation, Carolee found some papers at her door, picked them up and threw them away (T3. 6, 9, 18, 19). The District Court of Blaine County, State of Oklahoma, overruled Carolee's motion to quash summons at a hearing held on October 23, 1992, (O.R. 31A), and the same Court held a hearing on February 4, 1992, overruling Bettylu's objection to the taking of the land based upon Western Farmer's failure to negotiate with her (O.R. 31B).

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. On May 27, 1992, Carolee filed a Special Appearance-Motion to Quash Summons in the District Court of Blaine County, State of Oklahoma, "...to quash, set aside and hold for naught, the summons and purported service therof... for the reason

that the same ...was not personally served ..." She further contended that "service of summons in a manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction (O.R. 10-13). On May 27, 1992, Carolee orally presented the motion in open court, and the court without having a hearing, held "...they have service ..." (T1. 2-4). This motion was again presented orally in open court on June 2, 1992, at which time the court again held that "... service is approved..." without having a hearing (T2. 11). On June 4, 1992, an Application to Assume Original Jurisdiction and Petition for Writ of Prohibition were filed in the Supreme Court of Oklahoma, asserting that "...Carolee has never been duly served with notice...", and that the court "...has no jurisdiction over the person..." (O.S. C1). On October 23, 1992, Carolee was provided a hearing on her motion in the District Court of Blaine County, State of Oklahoma, orally contending that "...personal service is required," and that "...Carolee Stephenson was not confronted when the personal service was attempted." (T3. 12, 37, 38). The court stated that "...I don't think there's ever been s ruling on it..." finding it "...meets valid service." (T3. 42, 43). Carolee filed her

Petition in Error in the Supreme Court of Oklahoma on March 3, 1993, contending "...lack of jurisdiction...because of no legal service on her...", i.e. "...at no time was she personally served..." On April 6, 1993, Carolee filed her Brief in Chief contending that "...service of summons...is a condition precedent to a valid exercise of personal jurisdiction...", and that "valid service of notice in condemnation has never been obtained on Carolee..." On March 8, 1994, the Court of Appeals of the State of Oklahoma, Division III, Vol. 65 Oklahoma Bar Journal 1655-1656, decided that "...a person may not avoid service of such notice for lack of actual 'in hand' delivery.", and "such service is valid..." On March 23, 1994, Carolee filed her Petition for Certiorari in the Supreme Court of Oklahoma contending "...no personal service was ever obtained...", and that this was necessary "...to vest a court with jurisdiction." On April 19, 1994, the Supreme Court of Oklahoma summarily denied certiorari (O.S. C2).

II. On July 2, 1992, Bettylu filed her objection in the District Court of Blaine County, State of Oklahoma, based on Western Farmers having "...made no good faith attempt

to reach an agreement as to reasonable compensation for the subject property". (O.R. 29). On February 4, 1993, Bettylu was provided a hearing on her objection in the District Court of Blaine County orally presenting the issue of whether there "...has been good faith negotiations...", and asserting that "...no one from the company ever attempted to negotiate with her..." The court held that "...it's not necessary that negotiations be made...", and that "...they did attempt to make settlement... before suit was filed." (T4. 13, 41, 42, 47, 48). Bettylu filed her Petition in Error in the Supreme Court of Oklahoma on March 3, 1993, contending "...lack of jurisdiction for condemnation action against Bettylu Zeh on basis that no bona fide effort was made to negotiate with her." She further specifically alleged that "The trial court erred when determining that the appellee legitimately attempted to negotiate with Bettylu Zeh to acquire her interest in the subject realty." On April 6, 1993, Bettylu filed her Brief in Chief contending that "Western Farmers did not legitimately attempt to negotiate with Bettylu Zeh to acquire her interest in the subject realty.", and that "...a bona fide effort to purchase property sought to be condemned is a jurisdictional prere-

quisite to a condemnation action." She further asserted: "At no time did Western Farmers negotiate with Bettylu to purchase the property sought to be condemned." On March 8, 1994, the Court of Appeals of the State of Oklahoma, Division III, Vol. 65 Oklahoma Bar Journal 1655-1656, decided: "... While Oklahoma law establishes that a condemnor must undertake bona fide efforts to purchase the subject property from the owner as jurisdictional condition precedent to institution of a condemnation action, the condemnee may not wield the failure of negotiations as a sword to defeat the condemnation action where the failure of negotiations is attributable to the condemnee. In the present case, we find evidence in the record showing WFEC's efforts to negotiate with Carolee for purchase of the property and Carolee's failure/refusal to negotiate in good faith with WFEC.

"In a related argument Bettylu asserts WFEC never negotiated with her. However, upon failure of WFEC's negotiations with one of the co-owners, Carolee, Oklahoma law excused WFEC from further futile negotiations with the other co-owner, Bettylu. We therefore find no bar to WFEC's condemnation action for alleged lack of negotiations to purchase the subject tract." On March 23,

1994, Bettylu filed her Petition for Certiorari in the Supreme Court of Oklahoma asserting that "Western Farmers never negotiated with the landowner, Bettylu, to attempt to purchase her interest." She contended that "... a bona fide effort to purchase property sought to be condemned is a jurisdictional prerequisite to a condemnation action." She further contended that "...This decision by the Court of Appeals now having been released for publication as a guide for the law of our State effectively precludes such a landowner from any right to attempt to reasonably settle with a condemnor for her property rights, and requires instead that she be hailed into court to defend herself." On April 19, 1994, the Supreme Court of Oklahoma summarily denied certiorari (O.S. C2).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER CAROLEE STEPHENSON'S DUE PROCESS OR EQUAL PROTECTION RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WERE VIOLATED AS THE RESULT OF THE STATE OF OKLAHOMA NOT REQUIRING PERSONAL SERVICE OF SUMMONS AS REQUIRED BY ITS OWN STATUTE.

Due process requires that the defendant be given adequate notice of the suit. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). A judgment rendered in violation of due process is void. Pennoyer v. Neff, 95 U.S. 714, 732-733, 24 L. Ed. 565 (1878; and Insurance Corp. v. Compagne Des Bauxites, 456 U.S. 694, 702-703, 102 S. Ct. 2099, 72 L. Ed. 492 (1982). This case presents an important constitutional question meriting review by this Court, concerning the applicability of the Due Process Clause of the Fourteenth Amendment where the State did not require personal service of summons as dictated by its own Statute.

Where real property is being taken by eminent domain, the Oklahoma Statutes, at 66 O.S. 1991, Section 53, provides the

"...the condemnor shall give notice to a condemnee by personal service..." In Sealey v. Smith, 81 Okl.97, 197 P. 490 (1921), the Supreme Court of Oklahoma ruled that statutes prescribing the manner of service of summons are mandatory, and must be strictly complied with to vest the court with jurisdiction. Carolee never received notice of the condemnation action by personal service. On May 11, 1992, John Shadid called Carolee's home telephone number to say that he had some legal papers for her, and that she should later go to her door to get them (T3. 4) Later, someone did come to her home, say something, and leave some papers outside her door. On or after June 2, 1993, being six days after the date on which the hearing was attempted to be held pursuant to the Notice in Condemnation, Carolee found some papers at her door, picked them up and threw them away (T3. 6, 9, 18, 19). The Court of Appeals of the State of Oklahoma, Division III, upheld the decision of the District Court of Blaine County deciding that a person may not avoid service of such notice for lack of actual in hand delivery and that such service is valid. The Supreme Court of Oklahoma denied certiorari (O.S. C2.) This decision was made by the courts of Oklahoma in spite of the

Supreme Court of Oklahoma having previously determined that actual personal service is required. See Blackgold Exploration v. First Federal Savings and Loan Association of Elk City, Okl., 803 P.2d 1138 (1990); and Tammie v. Rodriquez, Okl. 570 P.2d 332 (1977).

The Due Process Clause ensures not only fairness, but also the "orderly administration of the laws". International Shoe Co., supra, 326 U.S., at 319, 66 S. Ct. 154, 90 L. Ed. 95, 161 ALR 1057 (1945). Justice Holmes wrote for the Court, in McDonald v. Mabee, 243 U.S. 90, 91, 37 S. Ct. 343, 61 L. Ed. 608 (1917): "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." The State of Oklahoma has failed in its duty to apply its Statute in accordance with the requirement of due process as guaranteed by the Fourteenth Amendment to the United States Constitution. A state cannot lay down a yardstick of what constitutes personal service which is wholly unrealistic to the concept of such term nor may a state apply a statute to facts which cannot be fairly said to sustain the conclusion that personal service was obtained.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER BETTYLU ZEH'S DUE PROCESS RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WERE VIOLATED AS THE RESULT OF THE STATE OF OKLAHOMA NOT REQUIRING HER, AS AN OWNER OF THE PROPERTY SOUGHT TO BE CONDEMNED, TO RECEIVE AN OPPORTUNITY TO NEGOTIATE FOR THE AMOUNT OF CONDEMNATION DAMAGES.

"What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case....The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled....Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." Anderson National Bank v. Luckett, 321 U.S. 233,

246-247, 88 L. Ed. 692, 704-705; Davidson v, New Orleans, 96 U.S. 97, 107, 108, 24 L. Ed. 616, 620, 621; Ballard v. Hunter, 204 U.S. 255, 27 S. Ct. 261, L. Ed. 471; North Laramie Land Co. v. Hoffman, 268 U.S. 282, 283, 45 S. Ct. 491, 69 L. Ed. 957; and Dohany v. Rogers, 281 U.S. 369, 50 S.C. 299, 74 L. Ed. 912, 68 A.L.R. 434.

Where real property is being taken by eminent domain the Oklahoma statutes, at 27 O.S. 1991, Section 13, provides that:

> "1. Every reasonable effort shall be made to acquire, expeditiously, real property by negotiation.
>
> 2. Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property...
>
> 3. Before the initiation of negotiations for real property, an amount shall be established which is reasonably believed to be just compensation therefor and such amount shall be propmtly offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such real property...."

The Oklahoma Supreme Court held, in Koch v.

Oklahoma Turnpike Authority, 208 Okl. 556, 257 P.2d 790 (1953), that a bona fide effort to purchase property sought to be condemned is a jurisdictional prerequisite to a condemnation action.

At no time did Western Farmers negotiate with Bettylu to purchase the property sought to be condemned. Mrs. Zeh testified as follows:

> Q. Has anyone from Western Farmers Electric Cooperative at any time talked with you, to attempt to negotiate with you for your damage for such a easement?
>
> A. No. (T4. 4)

Irene Abbott, the right of way agent for Western Farmers, corroborated this testimony:

> Q. Did you talk with Bettylu Stephenson Zeh and attempt to negotiate with Bettylu Stephenson Zeh concerning the damages to her property from the proposed easement?
>
> A. No. (T4. 33)

Although Western Farmers sent offer letters to Bettylu, there is no evidence that any were received. The following exchange was had between Bettylu's counsel and Mrs. Abbott:

> Q. Okay. And in regard to Plaintiff's

Exhibit Number 3, which is a letter dated September the 18th of 1991, to Bettylu Stephenson, you have no reason to believe that she ever received that, do you?

A. No. (R4. 32-33)

Also Bettylu testified that she received no correspondence from Western Farmers (T4. 36-37); and Carolee testified that she received no letter for Bettylu. (T4. 38-39).

Even if Carolee stated that she would handle Bettylu's interest in the property, she was without authority to do so. In Wheeler v. Puritan Insurance Co., 720 P.2d 729 (Okl. 1986), the Supreme Court of Oklahoma held that apparent authority results from manifestations by the principal to the third party that another person is his agent. To establish that an agent has apparent authority to act, the principal must have manifested his consent to the exercise of such authority or have knowingly permitted the agent to act exercising that authority. Additionally, the third party must know the facts and, acting in good faith, have reason to believe, and also actually believe, the agent possessed that authority.

In the case at bar, no evidence was presented, aside from alleged statements made by Carolee, that shows that Carolee or

anyone else had authority to negotiate for Bettylu. In fact, Irene Abbot testified that Bettylu never indicated that anyone had authority to negotiate for her (T4. 33-34). As the above referenced case law provides, it is the acts of the principal, here Bettylu, from which apparent authority develops, and not from acts of the agent. Western Farmers could not rely on statements made by Carolee that she had authority to negotiate for Bettylu. Bettylu never authorized Carolee to negotiate for her. Carolee was not her agent.

Therefore, the Oklahoma courts and legislature have both stated that good faith negotiation is a must in acquiring real property in condemnation. Witnesses for both Bettylu and Western Farmers testified that no negotiation discussion between Western Farmers and Bettylu ever took place. Offer letters may have been sent, but none were received by Bettylu. Bettylu never authorized anyone to negotiate for her. Western Farmers has not met its obligation to negotiate in regard to Bettylu.

The power of eminent domain is a sovereign power of the states not limited by the Federal Constitution otherwise than by the requirement of due process of law. 16A C.J.S. Constitutional Law Section 284,

Page 144. "One cannot be deprived of his property without due process of law." Newport and Cincinnati Bridge Co. v United States, 105 U.S. 470, 481, 26 L. Ed 1143, 1148 (1882); Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921); and United Gas Public Service Co. v. Texas, 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702 (1938). The Oklahoma state proceedings have denied Bettylu procedural due process. This fundamental principle was violated as the result of Western Farmers refusal to attempt to negotiate with Bettylu and the state supporting this denial. Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 28 L.Ed. 569 (1884).

CONCLUSION

The petitioners pray that the petition for a writ of certiorari be granted.

Respectively submitted,

Jerry Earl Benson

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APPENDIX

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RELEASE FOR PUBLICATION BY ORDER OF THE
COURT OF APPEALS

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA
DIVISION NO. III

WESTERN FARMERS ELECTRIC COOPERATIVE, ANADARKO, OKLAHOMA, Appellee,	)	
vs.	)	Case No. 81,206
CAROLEE STEPHENSON, BETTYLU STEPHENSON, also known as BETTYLU ZEH, Appellants.	)	

APPEAL FROM THE DISTRICT COURT
OF BLAINE COUNTY, OKLAHOMA
HONORABLE ROBERT LOVELL, JUDGE

AFFIRMED

Jerry Earl Benson,
BENSON AND ANNETT,
Watonga, Oklahoma, For Appellant,

John W. Garland,
PAIN AND GARLAND,
Anadarko, Oklahoma, For Appellees.

OPINION

Opinion by Robert L. Bailey, Judge:

Carolee Stephenson and Bettylu Stephenson (Carolee, Bettylu, or collectively, Appellants) seek review of the Trial Court's orders denying Carolee's motion to quash and overruling Appellants objection to commissioners' report in the condemnation action of Western Farmers Electric Cooperative, Anadarko, Oklahoma (WFEC). Herein, Appellants allege error of the Trial Court (1) in denying the motion to quash, WFEC having failed to affect personal service of notice on Carolee, and (2) denying Appellants' objection to commissioners' report, WFEC having failed to negotiate with Appellants concerning compensation for the land for which WFEC sought condemnation.

WFEC instituted the instant action to obtain an easement across land owned by the Appellants for construction of an electrical transmission line, alleging failure of diligent efforts to purchase the easement and requesting appointment of commissioners. WFEC engaged a private process server to serve Carolee with notice of the condemnation

action. The process server made return showing personal service on Carolee. Carolee entered a special appearance and motion to quash, alleging failure of personal service.

At hearing thereon, Carolee testified that the process server called her at home on the telephone announcing his intention to leave legal documents with her, that she refused to speak to the process server and hung up, and that she did not discover any documents until several days later when she threw the documents away without reading them; Carolee admitted, however, she had been avoiding service of notice. The process server and another witness testified that the process server called Carolee from a mobile telephone while parked in Carolee's driveway, that Carolee identified herself, that the process server told Carolee that he had documents for her, that immediately after Carolee hung up, the process server knocked on Carolee's door, that no one answered the door but that someone looked through the window at the process server, and that the process server left the notice of condemnation at Carolee's front door. Based on this evidence, the Trial Court denied Carolee's motion to quash.

After appointment of commissioners and

return of the commissioners' report, Appellants objected thereto, alleging WFEC's failure "to legitimately attempt to negotiate in acquiring [the subject] real property for public use," no necessity of the taking, and agreement of adjoining landowners for relocation of WFEC's proposed power lines. At hearing, Bettylu testified that she had never spoken to anyone with WFEC concerning acquisition of an easement across her property, and had never received any correspondence from WFEC with regard thereto. WFEC presented evidence that WFEC attempted to negotiate with both Carolee and Bettylu for acquisition of the easement by mail and in person, that letters from WFEC to Carolee and Bettylu went unanswered or unclaimed, that Carolee susequently held herself out as representing Bettylu's interest, and that upon Carolee's rejection of WFEC's initial offer, Carolee wrote WFEC a letter representing that it would cost "hundreds of thousands" of dollars to acquire the easement. Based upon this evidence, the Trial Court overruled Appellants' objection to the commissioners' report. Appellants now appeal.

As to the Trial Court's order denying Appellants' motion to quash, we find no error. While 66 O.S. 1991 §53(B) provides

for "notice to the condemnee by personal service or by leaving a copy of the notice at the condemnee's place of resident with some member of his family over fifteen (15) years of age," we hold a person may not avoid service of such notice for lack of actual "in hand" delivery.[1] That is, one "cannot avoid service by refusing physically to accept the summons if he is informed that service of summons is being attempted. ... Such service is valid and could not be avoided by ... refusal to open the door and accept the papers, or by ... denying [one's] true identity."[2] Considering the facts that Carolee had attempted to previously avoid service of process, and that Carolee knew the process server came to serve her with notice of the action, we therefore find valid service accomplished.

As to the Trial Court's order overruling Appellants' objection to the commissioners' report, we likewise find no error. While Oklahoma law establishes that a condemnor must undertake bona fide efforts to purchase the subject property from the owner as a

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[1] Business & Professional Adj. Co. v. Baker, 657 P.2d 1025 (Or.App. 1983).

[2] Peoples Trust of Bergen Cty. v. Kozuck, 236 A.2d 630 (NJ Super. 1967).

jurisdictional condition precedent to institution of a condemnation action,[3] the condemnee may not wield the failure of negotiations as a sword to defeat the condemnation action where the failure of negotiations is attributable to the condemnee.[4] In the present case, we find evidence in the record showing WFEC's efforts to negotiate with Carolee for purchase of the property and Carolee's failure/refusal to negotiate in good faith with WFEC.

In a related argument, Bettylu asserts WFEC never negotiated with her. However, upon failure of WFEC's negotiations with one of the co-owners, Carolee, Oklahoma law excused WFEC from further futile negotiations with the other co-owner, Bettylu.[5] We therefore find no bar to WFEC's condemnation action for alleged lack of negotiations to purchase the subject tract.

The orders of the Trial Court denying Appellants' motion to quash and overruling

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[3]Koch v. Oklahoma Turnpike Auth., 208 OKL. 556, 257 P.2d 790 (1953).

[4]Boeck v. State Highway Commission, 153 N.W.2d 610 (Wisc. 1967) (Condemnee may not assert failure of jurisdictional notice where failure of notice attributable to condemnee's refusal to accept the notice from the postman).

[5]Koch, 257P.2d at 794.

Appellants' objection to commissioners' report are therefore AFFIRMED.

HUNTER, P.J. and GARRETT, V.C.J., concur.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, April 19, 1994

THE CLERK IS DIRECTED TO ISSUE

THE FOLLOWING ORDERS:

81,206 Western Farmers Electric Cooperative, Anadarko, Oklahoma v. Carolee Stephenson, Bettylu Stephenson a/k/a Bettylu Zeh.

Certiorari denied.

All Justices concur.

/S/ Ralph B. Hodges /S/

CHIEF JUSTICE

IN THE DISTRICT COURT OF BLAINE COUNTY

STATE OF OKLAHOMA

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA, Plaintiff,	)	
vs	)	No. C-92-64
CAROLEE STEPHENSON and BETTYLU STEPHENSON, also known as ZEH, Defendants.	)	

ORDER OVERRULING MOTION TO QUASH FILED BY DEFENDANT CAROLEE STEPHENSON

On October 23, 1992, the above entitled cause came on for hearing upon the Motion to Quash filed by the defendant, Carolee Stephenson.

The plaintiff appeared by its attorney, John W. Garland, of the firm of Pain and Garland, Anadarko, Oklahoma, and by its representative Donald Riffel.

The defendant, Carolee Stephenson appeared in person and with her attorney, Jerry Earl Benson, of Watonga, Oklahoma.

Thereupon, the matter proceeded to hearing before the Court, and the Court, after having heard the testimony of witnesses called and sworn in open court, and after having examined the files and records in said case,

finds that the service of Notice upon the defendant was good and proper and lawfully made upon said defendant and that the Motion to Quash should be overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the service of Notice upon the defendant is good proper and is sufficient in all respects and that the defendant Carolee Stephenson has been lawfully served with notice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Motion to Quash filed by the defendant is hereby overruled.

Dated this 26th day of October, 1992.

/S/ Robert Lovell /S/

JUDGE OF THE DISTRICT COURT

IN THE DISTRICT COURT OF BLAINE COUNTY

STATE OF OKLAHOMA

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA, Plaintiff,	)	
vs	)	No. C-92-64
CAROLEE STEPHENSON and BETTYLU STEPHENSON, Defendants.	)	

ORDER OF POSSESSION

This matter coming on this 4th day of February, 1993, upon the Application for Order of Possession filed herein by the plaintiff, and the Court being fully advised in the premises finds that the plaintiff has deposited funds as required by Title 66 O.S,A, SS53, and is, therefore, entitled to immediate possession of said right of way with the right of ingress and egress on said property, without interference from or by the defendants, for the purposes as set forth in the petition.

The Court further finds that on proper application by the defendants, the Court, by proper order, shall authorize the Court Clerk to pay the defendants the award so deposited by the plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff have and is hereby granted the right of immediate possession with the right of ingress and egress to the following described property, to-wit:

A permanent right of way easement across the following described land:
The North Fifty (50) feet of the West Half (W/2) of the Southeast Quarter (SE/4) of Section Twenty-Seven (27), Township Sixteen (16) North, Range Eleven (11) West, I.M., and

A temporary right of way easement across the following described land:
Twenty-Five (25) feet South of and adjacent and contiguous to the North 50 feet of the West Half (W/2) of the Southeast Quarter (SE/4) of Section Twenty-Seven (27), Township Sixteen (16) North, Range Eleven (11) West, I.M., Blaine County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that upon proper application of the defendants, the Court by proper order shall authorize the Court Clerk to pay the defendants the award so deposited by the plaintiff.

/S/ Robert Lovell /S/

JUDGE OF THE DISTRICT COURT

IN THE DISTRICT COURT OF BLAINE COUNTY

STATE OF OKLAHOMA

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA, Plaintiff,	)	
vs	)	No. C-92-64
CAROLEE STEPHENSON, and BETTYLU STEPHENSON, also known as BETTYLU ZEH, Defendants.	)	

ORDER OVERRULING OBJECTION TO REPORT OF COMMISSIONERS

Now on this 4th day of February, 1993, the above entitled cause comes on for hearing, with the plaintiff appearing by its attorneys, Pain and Garland, and the defendants, Carolee Stephenson and Bettylu Stephenson, also known as Bettylu Zeh, appearing in person and with their attorney, Jerry Earl Benson.

Thereupon, the parties announced ready for hearing before the Court, and the defendant, introduced his evidence in support of his Objection to Report of Commissioners and rested. The plaintiff introduced its evidence and rested.

The Court finds, after having heard the evidence of witnesses called and sworn in open Court, and after having examined the

files and records in said cause, that the relief prayed for by the defendants should be in all respects denied.

The Court further finds that the plaintiff has made a bona fide effort to acquire the property sought to be condemned by purchase before instituting condemnation proceedings.

The Court further finds that the plaintiff is an electric cooperative authorized to exercise the power of eminent domain and that it is necessary for the plaintiff to exercise the power of eminent domain and that these proceedings are necessary for public use and that this justifies the exercise of the power of eminent domain by plaintiff. The Court further finds that the plaintiff has not exercised said power fraudulently, in bad faith or abused its discretion.

The Court further finds that the defendants offered no evidence to show that the adjoining peoperty owners have agreed to the shifting of the power line further onto their property.

IT IS THERFORE ORDERED, ADJUDGED AND DECREED by the Court that the objection to the report of commissioners filed by the defendants, Carolee Stephenson and Bettylu Stephenson, also known as Bettylu Zeh, is

hereby denied.

IT IS FURTHER ORDERED, ADJUGED AND DECREED by the Court that the defendants' request for a restraining order is hereby denied.

/S/ Robert Lovell /S/

JUDGE OF THE DISTRICT COURT

APPROVED:

/S/ John W. Garland /S/

JOHN W. GARLAND
Attorney for Plaintiff

/S/ Jerry Earl Benson /S/

JERRY EARL BENSON
Attorney for Defendant

Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

(2)

NO. 94-132

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CAROLEE STEPHENSON AND BETTYLU STEPHENSON, ALSO KNOWN AS BETTYLU ZEH,

Petitioners,

-vs-

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES LESLIE PAIN
PAIN AND GARLAND
111 S.W. Second (P.O. Box 158)
ANADARKO, OKLAHOMA 73005
(405) 247-3365
Attorney for Respondent

August 12, 1994

BEST AVAILABLE COPY

25 pp

QUESTIONS PRESENTED

1. Did either petitioner raise the questions of federal due process under the Fourteenth Amendment to the United States Constitution at any stage of the proceedings in either the court of first instance or appellate courts of the State of Oklahoma?

2. Is there a substantial federal question in state court approval of service of notice upon one avoiding such service, made by leaving the notice at her residence door while she was present refusing to open the door, immediately after telephoning her from the residence driveway to tell her what the notice was and where it would be left?

3. Does failure to require negotiation with one cotenant before condemnation proceedings after the other cotenant has refused to negotiate present a substantial federal question?

PARTIES

The parties are as shown in the caption.

Respondent, Western Farmers Electric Cooperative, is an Oklahoma rural electric cooperative with offices at Anadarko, Oklahoma, supplying wholesale electric power to its members: Alfalfa Electric Cooperative, Inc., Caddo Electric Cooperative, Canadian Valley Electric Cooperative, Inc., Choctaw Electric Cooperative, Inc., Cimarron Electric Cooperative, Cotton Electric Cooperative, Inc., East Central Oklahoma Electric Cooperative, Inc., Harmon Electric Association, Inc., Kay Electric Cooperative, Kiamichi Electric Cooperative, Inc., Kiwash Electric Cooperative, Inc., Northfork Electric Cooperative, Inc., Northwestern Electric Cooperative, Inc., Oklahoma Electric Cooperative, People's Electric Cooperative, Red River Valley Rural Electric Association, Rural Electric Cooperative, Inc., Southeastern Electric Cooperative, Inc., Southwest Rural Electric Association, Inc., all of which are Oklahoma rural electric Cooperatives, and the United States of America, acting through the Altus Air Force Base, Department of Defense.

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NO. 94-132

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CAROLEE STEPHENSON AND BETTYLU STEPHENSON, ALSO KNOWN AS BETTYLU ZEH,

Petitioners,

-vs-

WESTERN FARMERS ELECTRIC COOPERATIVE, OF ANADARKO, OKLAHOMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Western Farmers Electric Cooperative, of Anadarko, Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioners, Carolee Stephenson and Bettylu Stephenson, also known as Bettylu Zeh.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution would be involved if there were any question of violation of federal due process presented. 66 Oklahoma Statutes 1991 (hereafter cited as O.S. 1991), Sec. 53 B, cited in the petition for certiorari, governs the notice to be given in condemnation proceedings.

However, 27 O.S. 1991, Section 13, cited in the petition, has no application to these proceedings, under the provisions of 27 O.S. 1991, Section 15:

> "The provisions of Section 5 (Title 27 section 13) create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

Rather, the applicable statutes are 18 O.S. 1991, Sec. 437.2:

> "A cooperative shall have power:
>
> "(o) To have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations under the laws of this state."

and 66 O.S. 1991, Sec. 53A:

> "If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right of way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.

THE NATURE OF THE CASE

This is an eminent domain proceeding in which respondent sought a right of way easement for an electric transmission line across land owned by petitioners as cotenants.

The statement of petitioners omits the evidence offered by respondent, which is summarized here.

Irene Abbott, respondent's right of way agent, testified (T4, 18-35) that she wrote letters to each petitioner requesting the easement and making an offer, but petitioner Bettylu's letter was returned "unclaimed". Bettylu admitted (T4, 4-5) that the address on the letter sent to her was her correct address. Afterward, Abbott

went to that address in person, but found no one there. Abbott did communicate with petitioner Carolee by telephone and in person, but Carolee refused to grant the easement and gave Abbott a letter advising that if respondent sought judgment, it would cost respondent "hundreds of thousands" of dollars. Thereafter condemnation proceedings were instituted.

With reference to the service of notice here, the process servers, Shadid and Kirby, testified (T3, 15-34) that they drove to petitioner Carolee's residence and called her residence phone number on their mobile phone from the driveway of her residence. Carolee answered and identified herself, but when Shadid told her what papers he had and that he was taking them to her door, Carolee said she was not interested and hung up. Shadid immediately went from the car to the door of Carolee's residence, knocked loudly, then saw a window curtain move and Carolee look out the window. When there was no answer, he called out that he knew Carolee was there and he was leaving the papers at the door. Carolee admitted (T3, 6-9) that she was at her home the day in question, that she received the telephone call, and that the papers stayed at her door until she removed them and threw them away three weeks later, and further that she had been avoiding service for several months.

Commissioners were duly appointed, assessed the damages sustained by petitioners, filed their report and respondent has appointed the amount so assessed with the

state court at first instance. Petitioners have not filed a demand for jury trial on the issue of damages, but filed objection to the report of commissioners on the issues of service of notice and prior negotiations.

ARGUMENT AND AUTHORITIES

1. Certiorari should be denied because petitioners have failed to raise any federal question to the state court of first instance or to its appellate courts, but in both pleadings and arguments have alleged violation of state law and procedure.

2. Certiorari should be denied because no substantial federal question has been presented either on the question of notice or on the question of pre-condemnation negotiation.

a. As to service of notice, service upon one who was avoiding service by leaving the papers in some appropriate place in his or her presence where it will most likely come into his possession was held by the state courts to be valid service in compliance with its statutes, in accordance with the overwhelming weight of authority, including two cases in which service was made in the same manner and this Court denied certiorari.

b. As to negotiation with one cotenant when the other cotenant having refused to negotiate as being unnecessary because futile, this ruling of the state courts was in acquaintance with prior state and federal cases holding that the requirement for negotiation is a creature of state statutes and is not required under due process, again including cases in which this Court has denied certiorari.

1. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS HAVE FAILED TO RAISE A FEDERAL QUESTION IN THE STATE COURTS.

The petition for certiorari fails to show any stage of the state court proceedings at which petitioners raised a federal question, but all pleadings, argument and briefs in the state courts asserted lack of jurisdiction under Oklahoma statutes. The motion to quash was on the basis that service of summons in a manner prescribed by statute had not been made. Their objection to report of commissioners was based on failure to make an attempt to reach an agreement, which can be based only on state statute. Their petition in error to the Oklahoma Supreme Court stated as the points of law urged as error:

"1. The trial court erred when determining that personal service sufficient for a condemnation action was obtained for merely calling Carolee Stephenson's home and leaving papers at her door.

"2. The trial court erred when determining that the appellee legitimately attempted to negotiate with Bettylu Zeh to acquire her interest in the subject realty."

The record in this case is like that in F.E. Oxley Stave Co. v. Butler Co., 166 U.S. 648, 17 S.Ct. 709, 1897, where the opinion states:

"Looking into the record, we do not find that any reference was made in the court of original jurisdiction to the constitution of the United States. Nor can it be found in the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question."

There this Court held that the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place beyond question that the party bringing a case here from such court intended to assert a federal right.

2. CERTIORARI SHOULD BE DENIED FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION ON EITHER NOTICE OR PRE-CONDEMNATION NEGOTIATION.

a. NO SUBSTANTIAL FEDERAL QUESTION AS TO NOTICE.

The Oklahoma statute governing notice in these condemnation proceedings is 66 O.S. 1991, Sec. 53B, which provides:

> "The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen years of age, * * *"

The undisputed evidence is that the notice was left with petitioner Carolee at her place of residence after she had been told by telephone from her residence driveway to her residence number it was being brought to her door, and was left at her door after she failed to answer the door when the process server knocked. Petitioner

admitted being at her residence, receiving the telephone call, and that papers were left at her door. Under these circumstances, the Oklahoma courts followed the overwhelming weight of authority in holding that where facts occur that would convince a reasonable person that personal service was being attempted, service cannot be avoided by refusing to take the document in hand, but service may be effected by depositing the paper in some appropriate place in his or her presence where it would most likely come into his or her possession.

So in International Controls Corporation v. Vesco, 593 F.2d 166, (CA - 2 N.Y., 1979), approving the service of summons thrown over a fence and left there, the opinion states:

> "The summons and complaint were clearly 'left' at Vesco's residence, and Judge Stewart so found in his opinion of May 2, 1978. As in the case of the service made by Mrs. Yohonn, we think there was clear compliance with the constitutional requirements of due process."

Certiorari was denied by this Court at 442 U.S. 941, 61 L.Ed. 311, 99 S.Ct. 2884.

Again in Peoples Trust Co. of Beryen County v. Kozuck, 103 N.J. Super, 151, 236 A.2d 630, afd 103 N.J. Super. 151, 246 A.2d 744, under similar circumstances the court held:

> "It is generally held that when a summons is offered to someone, he cannot avoid service by refusing physically to accept the summons if he is informed that service of summons is being attempted. * * * "

Certiorari was denied by this Court at 395 U.S. 966, 89 S.Ct. 2111. At least ten other state jurisdictions have adopted the same rule.[1]

Petitioners cite no authority whatever, and we know of none, which supports their claim that due process requires in hand delivery of notice. Most of the cases from this Court cited by petitioners were those in which the service was by publication only. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652, this Court's opinion stated at P.314:

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[1] Riggin v. Dierdorff, Ark., 790 S.W. 2d 987;
Ex Parte Ball, Cal. App., 38 P.2d 411;
Trujillo v. Trujillo, Cal. App., 162 P.2d 640;
Haney v. Olin Corp. (Fla. App.) 245 So. 2d 669, 671;
Libermann v. Commercial Nat'l Bank of Broward County (Fla. App.), 256 So. 2d 63;
Hatmaker v. Hatmaker (Ill. App.) 85 NE 2d 345;
Nielson v. Braland (Minn) 119 N.W. 2d 747;
Bossuck v. Steinberg (N.Y. Ct. App) 446 N.E. 2d 56;
Flex Credit v. Winkowitsch, (N.D.), 428 N.W. 2d 236;
Business & Professional Adjustment Co. v. Baker (Or. App.) 657 P.2d 1015;
Woud v. Weenig (Utah App.) 736 P.2d 1053;
Thayer v. Edmonds (Wash. App.) 503 P.2d 1110;
United Pacific Ins. Co. v. Discount Co., (Wash. App.) 556 P.2d 699.

> "Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to non residents. We disturb none of the established rules on these subjects."

The requirement set forth in the cases from this Court is, as stated at P.314 of Mullane, above, is:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (citing cases) The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance. (citing cases) But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."

The notice and service here meets all these requirements, as shown by the fact that petitioners with their attorney were present and participated at every hearing involving them.

b. NO SUBSTANTIAL FEDERAL QUESTION AS TO PRE-CONDEMNATION NEGOTIATION.

Petitioners attempt to establish some kind of right under 27 O.S. 1991 Sec. 13, as cited at pages 3, 4 and 17 of their petition for certiorari. However, they ignore 27 O.S. 1991 Sec. 15, about which the Oklahoma Court of Appeals stated in Western Farmers Electric Cooperative v. Willard, Okl. App., 726 P.2d 361, concerning this section:

> "However, Landowners seem to be unaware that this statement is a statement of policy only. 27 O.S. Sec. 15 specifically provides as such. This section states:
>
> 'The provisions of (sec. 13) create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.'
>
> "Consequently the trial court was correct in denying Landowners' objections based on Appellee's alleged failure to comply with Section 13."

Petitioners cite Koch v. Oklahoma Turnpike Authority, 208 Okl. 556, 257 P.2d 790 (1953) as authority for the rule that it is necessary that a condemnor allege and prove it made a bona fide effort to acquire the property by purchase before instituting condemnation proceedings. However the opinion in that case states:

> "We think this contention, as a general rule, under a statute like our own, is correct. *** This rule, however, has its exceptions. In Am Jur. Eminent Domain, Sec. 319, it is said:
>
> > '*** Where an offer to one joint owner, as to his undivided interest, fails there is no necessity for further negotiation.*** 'when an attempt to agree upon value would be futile, no attempt need be made.'"

Koch, above, held that since a minor's interest could not be acquired by purchase, it was not essential that it make an effort to acquire by purchase the interest of the adult owner.

The applicable statute, 66 O.S. 1991, Sec. 53A provides:

> "If the owner of any real property or interest therein. * * * shall refuse to grant the right

> of way through and over his premises, the district judge * * *" (emphasis ours).

shall appoint commissioners. Petitioner Carolee, owner of an interest in the land, did refuse to grant the right of way and under the language of the statute, respondent was entitled to have commissioners appointed.

Again, under these circumstances, the Oklahoma courts have followed the overwhelming weight of authority for the rule that no negotiation with a co-owner is necessary if negotiation with another co-owner fails.

In Town of Darien v. Kavookjian, (Conn.) 202 A.2d 147 (1964), the Connecticut Supreme Court held:

> "Moreover, where an offer to one joint owner as to his undivided interest in the property fails, there is no necessity for further negotiation with the other owner."

This Court denied certiorari at 379 U.S. 840, 85 S.Ct. 79 (1965). Several other jurisdictions have adopted this rule.[2]

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[2]Boeck v. State Highway Commission (Wis.) 153 N.W. 2d 610;
City of Dallas v. Arnoff (Tex Civ. App.) 316 S.W. 2d 301;
Commonwealth v. Southern Hill Nurseries (Ky.) 343 S.W. 2d 842;
M.& A. Electric Power Cooperative v. Georger (Mo.), 480 S.W. 2d 868;
Public Service Co. v. Recktenwald, (Ill.) 125 N.t. 271;
Rogers v. Cosgrave, (Neb.) 153 N.W. 569;
Town of Hereford v. Harris (N.C.), 140 S.E. 2d 420.

Petitioners have cited no case, and we know of none, holding that a landowner has a constitutional right to prior negotiation. All such rights depend on a statute so providing.

No case from this Court cited by petitioners has any application to the facts and issues in this case, but hold upon the facts of those cases that property may not be taken without due process of law.

CONCLUSION

Petitioners failed to raise a federal question in the court of first instance or appellate courts of the State of Oklahoma.

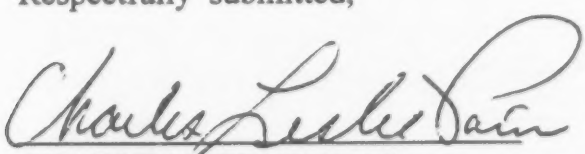
Petitioners have failed to present a substantial federal question with respect to the notice served on the petitioner avoiding notice, following the same rule adopted by many other jurisdictions, including the federal jurisdiction, in at least two of which this Court denied certiorari. If there was no substantial federal question presented in those cases, none has been presented here.

Petitioners have cited no authority from this Court or otherwise tending to show that the right to negotiation of damages before condemnation proceedings is a constitutional right rather than entirely a creature of state statute, particularly as to the futility in attempting to negotiate with one co-owner after the other co-owner has refused.

Petitioners have shown no decision of another state, of a United States Court of Appeals, or of this Court which conflicts with the decisions of the Oklahoma courts in this case.

For these reasons, certiorari should be denied.

Respectfully submitted,



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